No. 3007.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, JR., and J. U. HASTINGS,

Defendants in Error,

and

WILLIAM LANGE, JR., and J. U. HASTINGS,

Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

Opening Brief for Western Union Telegraph Company, Plaintiff in Error

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OPENING BRIEF FOR WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR.

The record presents two writs of error directed to the United States District Court for the Northern District of California, to review a judgment in favor of

plaintiffs and against defendant below, for the sum of $11,250 in damages for delay in the delivery of a telegram. Plaintiff in Error, the defendant below, complains of such judgment. The plaintiffs below complain because the judgment did not allow interest. By stipulation of all parties, the entire record in both cases is presented in one transcript. As each party is Plaintiff in Error in one instance and Defendant in Error in the other, we beg leave, in order to avoid confusion of terms, to refer to them in this brief by their proper names or as plaintiffs and defendant, respectively, in the court below.

STATEMENT OF THE CASE.

The case was tried chiefly upon the admissions in pleadings and an Agreed Statement of Facts; but there was some testimony offered. The case was tried before the Court without a jury, a jury having been waived (Tr., 164). The telegram was sent by plaintiffs Lange and Hastings, from Oakland, California, to Lyon County Bank, at Yerington, Nevada, for the purpose of intercepting the payment of a draft previously mailed by them to said bank for $11,250, to meet a payment which was to become due under a contract made by said Lange and Hastings with W. C. Pitt and W. T. Campbell, wherein the latter agreed to sell and the plaintiffs agreed to buy certain shares of mining stocks and provided for the payment at in-

tervals to said bank which held the contract in escrow. The essential facts of the case are these:

On March 16, 1907, plaintiffs Lange & Hastings entered into a written agreement with W. C. Pitt and W. T. Campbell, set out in the record at pages 75 to 77. By this contract the first parties, Pitt and Campbell, agreed to sell, and the second parties, Lange and Hastings, agreed "to buy, take and receive from said parties of the first part" certain shares of mining stock upon the following terms and conditions in substance:

1st. The total price or sum to be paid was seventy-five thousand dollars, of which seven thousand five hundred was to be paid on the execution of the agreement, and the remainder in installments of eleven thousand two hundred and fifty dollars each at intervals of two months thereafter, beginning May 1, 1917.

2nd. The shares of stock were to be deposited in escrow in the said Lyon County Bank, properly endorsed, to be delivered to Lange & Hastings upon final payment therefor, and by such contract "the Lyon County Bank is hereby constituted the agent of the sellers for the purpose of receiving all payments and giving acquittances."

3rd. "And it is further agreed that in the event of
" default by said parties of the second part in making
" any of the payments herein provided for, said Lyon
" County Bank shall be authorized under the terms of

" such deposit in escrow, and it is hereby authorized, " to deliver all of the shares of stock so deposited with " it pursuant hereto to said parties of the first part, and " that all payments theretofore made by said parties of " the second part shall be forfeited to said parties of the " first part, and that thereupon all rights of each of the " said parties hereunder shall forever cease and de- " termine" (Tr., 77).

The complaint in the action did not set up a copy of the contract and did not allege that Lange and Hastings had agreed to "buy, take and receive" said shares of stock and pay for the same, but alleged only that Pitt and Campbell had agreed to sell the stock (Tr., 5). Neither did the complaint allege that in the event of default of payment, the Bank was authorized to return the stock and the payments therefore made should be forfeited and "that thereupon" all rights of each of the said parties should cease and determine but, on the contrary, alleged that "upon such *default*" all rights of each of the parties should cease and determine (Tr., 6).

The stock was deposited in escrow pursuant to said agreement, and the cash payment made at the time of its execution. The next payment of $11,250 was due on or before May 1, 1907. On April 27th, plaintiffs purchased a bank draft for that amount and forwarded it by registered letter, from Oakland, California, to the Lyon County Bank, at Yerington, Nevada. In

ordinary course of the mail this draft should have arrived and been delivered to the bank on the evening of April 29th or on the morning of April 30th. It was in fact received by the bank between the hours of 8:30 and 9:00 o'clock A. M. on the latter date. With the draft, was a letter of instructions from plaintiffs to the bank stating that the draft was to apply on the payment due under the escrow of Messrs. Pitt and Campbell. After mailing the draft the plaintiffs claimed to have received information to the effect that the stock of the mining company was of little value and determined to make no further payments. Accordingly, at 8:50 o'clock on the *evening* of April 29th, they filed with the defendant Western Union Telegraph Co. at its office in Oakland, California, the message in suit reading:

"Oakland, April 29th, 1917.

"Lyon County Bank,
Yerington, Nevada,

"Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

HASTINGS AND LANGE."

Plaintiffs at the time, explained to the defendant's agent the purpose of the message, stating that they had mailed a draft for $11,250 to the Lyon County Bank on April 27th to meet a payment due on a contract for the purchase of shares of mining stock by them from Pitt and Campbell and desired to have the mes-

sage delivered "before banking hours on the morning of April 30th," for the purpose of intercepting the payment of the draft, and that unless the message was delivered to the bank before that time, the money would be paid to Pitt and Campbell and the amount of the draft would be lost to them. The telegraph message was in typewriting, prepared by plaintiffs in their own office in Oakland, prior to going to the telegraph office and written on one of the regular blanks of the telegraph company, which is set out in Finding XI (Tr., 53-54). The full message containing all the stipulations and agreements in reference thereto is found in plaintiffs' Exhibit 3 (Tr., 83-5). The pertinent parts of the message contract are that the message is sent

> "subject to the terms on the back hereof, which are hereby agreed to."

The agreement referred to classified messages according to the liability which is to be assumed by the company for mistakes and delays in the transmission or delivery thereof, and provides for a different rate for each class of message. The rate is proportioned to the liability. The contract provides in effect that the message, at the parties' own option, may be sent at the risk of the sender, or at the risk of the company.

> *Primrose* v. *Western Union Tel. Co.*, 154 U. S., 1.

These classifications are "unrepeated messages," "repeated messages" and "insured messages."

First. The smallest rate is charged for an unrepeated message, for which it is agreed the company shall not be liable for mistakes or delays in the transmission or delivery thereof, beyond the amount received for sending the same.

Second. Repeated messages, that is messages which are telegraphed back to the originating office for comparison, are sent for one and one-half times the rate charged for an unrepeated message, and for which it is agreed the company shall not be liable beyond fifty times the sum received for sending the same, *unless specially insured.*

Third. In addition to the toll upon a repeated message, correctness in transmission can be *insured by a contract in writing* for one per cent. of the amount agreed upon.

The message contract further provides that

> "This company is hereby made the agent of the sender *without liability* to forward any message over the lines of any other company when *necessary to reach its destination.*"

The regular course of transmission of telegrams from Oakland, California, to Yerington, Nevada, at that time was by way of Reno to Wabuska, in the State of Nevada, "which was the *terminus* of the Western " Union Telegraph Company's lines for Yerington

"messages, and thence by telephone over the line of the "Yerington Electric Company to Yerington" (Agreed Statement, Tr., 67). Each company had its office at Wabuska in the office of the Southern Pacific Railroad Company, and each made its own arrangements with the railroad company to handle its business at that point. Each company charged its own separate tolls. It is agreed that "In order to transmit the "telegram in suit by telegraph or telephone beyond "Wabuska, *it was necessary* that it be forwarded from "that point over the line of the Yerington Electric "Company to Yerington" (Agreed Statement, Tr. 68).

The regular charge for transmitting said message as an *unrepeated message* from Oakland to Yerington, including the tolls of the connecting line, which were collected at the initial office, was 98c. The total charge for transmitting said message as a *repeated message* was $1.47 (Finding X, Tr., 53). The regular charge for transmitting the same as an *insured message* under the terms of the contract of transmission and upon the basis of value claimed for it was $112.50 in addition to the usual charge for a repeated message.

The plaintiffs claimed they paid $1.45 for the transmission of the message. Defendant's agent disputed this and claimed payment was made only for an unrepeated message, but testified that if the amount received was more than that, it was paid by mistake. The Court found, as alleged by plaintiffs, the amount paid was $1.45, for which sum it was found defendant's

agent, on behalf of defendant, "agreed to immediately transmit and immediately deliver the same to said Lyon County Bank at said Town of Yerington for said plaintiffs and *insured to plaintiffs such immediate transmission and such immediate delivery thereof as aforesaid"* (Tr., 52, also Finding XII, Tr., 56). It was shown by the deposition of H. Hironymous, the manager of the Yerington Electric Company, that the office at Yerington was not a night office, and no messages could be received between 9 o'clock at night and 7 o'clock the following morning.

The message was filed in Oakland at 8:50 P. M. April 29th (see original Exhibit No. 3 on file, and Tr., p. 139). It was stipulated (Tr., 70) that it was transmitted to and received at Reno, Nevada, prior to the hour of 9:30 the same evening. The Court found that the defendant did not promptly transmit the message to Wabuska nor deliver the same to the connecting line at that point until May 2d, 1907; that the delay occurred wholly on the lines of the defendant (Finding XV, Tr., 58), and ~~not~~ that defendant, with what the Court finds to be gross negligence, delayed the delivery of said message so long said message was not delivered to or received by said Lyon County Bank until May 2d, 1907 (Tr., 59).

The Bank received the registered letter containing the draft between 8:30 and 9 o'clock on April 30th, and made payment to Pitt and Campbell upon the contract.

The Court found that plaintiffs made no further payment on the contract, but forfeited and lost what had been paid.

The Court found upon the conflict of testimony that the shares of stock referred to in said contract have been at all times since and including the 29th day of April, 1907, practically valueless (Tr., 60) and awarded judgment for plaintiffs as above set forth. After judgment against it in said cause, the defendant obtained from this Honorable Court the writ of error to review said cause and assigned and now assigns as error the following:

ASSIGNMENT OF ERRORS.

I.

The Court erred in overruling and in not sustaining the defendant's demurrer to said complaint on file herein.

II.

The Court erred in overruling and in not sustaining defendant's demurrer to the first count of plaintiffs' complaint herein.

III.

The Court erred in overruling and in not sustaining defendant's demurrer to the second count of plaintiffs' complaint herein.

IV.

The Court erred in overruling and in not sustaining defendant's objection to the question propounded to plaintiff Lange, as follows: "Q. Mr. Lange, did you read the stipulation on the back of the telegraph blank on which your message was accepted for transmission?" (Referring to the original telegram of April 29th.)

V.

The Court erred in overruling and in not sustaining defendant's objection to the question propounded to plaintiff J. U. Hastings, as follows: "Q. Did the agent call your attention to any of those?" (Referring to stipulation on the back of the message.)

VI.

The Court erred in overruling defendant's motion for a non-suit interposed by defendant at the close of plaintiffs' evidence, for the reasons set forth in said written motion for non-suit, which was and is as follows:

> "We now interpose motion on behalf of defendant for nonsuit upon the ground that the plaintiffs have not proven any cause of action against the defendant and have not shown any negligence or any failure to perform and discharge its duty under the contract in sending this message."

VII.

The Court erred in finding and deciding as follows:

"That on the same day, but after the execution of said contract, plaintiffs arranged with said Lyon County Bank to treat any drafts they might send the bank in partial payment under the contract as gold coin, and to pay the amount of such drafts in gold coin to said Pitt and said Campbell for plaintiffs pursuant to the terms of said contract between plaintiffs and said Pitt and said Campbell and on account of the payments to be made thereunder."

VIII.

The Court erred in finding and deciding as follows:

"That thereupon said defendant, through its said agent, represented to said plaintiffs that said defendant would insure the immediate delivery of said message to said Bank at said town of Yerington, if plaintiffs would pay to said defendant the sum of one and forty-five hundredths dollars in lawful money of the United States, which said sum was in excess of said defendant's regular charges for transmitting such a message from Oakland to Yerington—defendant's said regular charges being the aggregate sum of its own tolls for the transmission of such a message from Oakland to Wabuska, plus the tolls of Yerington Electric Company for the transmission of such a message from Wabuska to Yerington. That plaintiffs thereupon accepted said proposal of said de-

fendant to transmit said message immediately and to insure its immediate delivery as aforesaid, and then and there plaintiffs delivered to said defendant said message in writing and paid the sum of one and forty-five hundredths dollars to said defendant, through its said agent, and defendant then and there accepted and received of plaintiffs said sum last mentioned, and thereupon, and in the presence of plaintiffs, said defendant, by its said agent, wrote upon said message and immediately below the date thereof, the words 'Deliver immediately,' and simultaneously therewith accepted said message for immediate transmission to said town of Yerington and for immediate delivery to said Lyon County Bank, and agreed to immediately transmit and immediately deliver the same to said Lyon County Bank at said town of Yerington for said plaintiffs, and insured to plaintiffs such immediate transmission and such immediate delivery thereof, as aforesaid:

IX.

The Court erred in finding and deciding as follows:

"That it is not true that defendant stated to plaintiffs at any time that there was no way of insuring the immediate transmission or delivery of said message, or the transmission or delivery thereof within any definite time, to the town of Yerington. That it is not true that defendant informed plaintiffs that the lines of telegraph of the defendant did not extend beyond the town of Wabuska, or that beyond that point the said mes-

sage would have to be transmitted over a connecting telephone line. That it is not true that defendant suggested to plaintiffs at any time that in order to hasten delivery of said message plaintiffs might write the words 'Deliver immediately' upon the face of the same, to be charged for at the usual rate of tolls. That it is not true that defendant did not, at the time said message was offered to, and accepted by it for transmission and delivery, as aforesaid, inform plaintiffs that it could not insure the transmission or delivery of any message beyond the lines of said defendant."

X.

The Court erred in finding and deciding as follows:

"That the sum of one and forty-five hundredths dollars, so paid to defendant for said message, was in excess of the defendant's regular and usual tolls for the transmission and delivery of the same as an unrepeated message, the usual toll therefor being ninety-eight cents. That the total charge for transmitting such a message as that herein referred to, from Oakland, California, to Yerington, Nevada, over the telegraph lines of defendant and over the telephone line of Yerington Electric Company hereinafter mentioned, as a 'repeated message,' was, at the date of said message, the sum of one and forty-seven hundredths dollars. And the Court finds that the said sum of one and forty-five hundredths dollars, by plaintiffs paid to defendant, was so paid and was by defendant accepted in consideration of the agreement and undertaking by

defendant immediately to transmit and immediately to deliver said message in such manner and under such classification as, pursuant to the rules and regulations of defendant, was required in order that defendant would insure to plaintiffs such immediate transmission and immediate delivery thereof to said Lyon County Bank."

XI.

The Court erred in finding and deciding as follows:

"That said blank form was one furnished by defendant at its said office for the use of all persons desiring to send telegrams, and plaintiffs did not, nor did either of them, read the printed matter on said blank, and plaintiffs were not, nor was either of them, cognizant of the terms and conditions printed thereon, nor did the defendant or its agent call the attention of the plaintiffs, or either of them, to said terms or conditions, or to any of them."

XII.

The Court erred in finding and deciding as follows:

(See XII) "That defendant accepted said message for immediate transmission and immediate delivery thereof, and insured to plaintiffs the immediate transmission and immediate delivery thereof as directed."

XIII.

The Court erred in finding and deciding as follows:

"That defendant did not promptly, upon receipt of said message on the evening of April 29th, 1907, transmit the same to the town of Wabuska, in said State of Nevada. That defendant did not promptly deliver said message to said Yerington Electric Company for further transmission over the telephone line of said last named Company to the town of Yerington. That, on the contrary, defendant wholly failed and neglected to transmit said message to said Wabuska until May 2nd, 1907, and wholly failed and neglected to deliver said message to said Yerington Electric Company until May 2nd, 1907. That such failure and neglect of said defendant and the delay in the receipt of said message by said Lyon County Bank, as herein found, occurred wholly on the lines of telegraph of said defendant and was caused by defendant, and did not at all occur upon the lines of telephone of said Yerington Electric Company and was not caused by said last named Company."

XIV.

The Court erred in finding and deciding as follows:

(See XVI) "That defendant with what the Court finds to be gross negligence, delayed the transmission and delivery of said message so long that said message was not delivered to or received by said Lyon County Bank until the 2nd day of May, 1907."

XV.

The Court erred in finding and deciding as follows:

"That said 625,000 shares of the capital stock of Kennedy Consolidated Gold Mining Company, hereinbefore mentioned, have been, at all times since and including the 29th day of April, 1907, practically valueless."

XVI.

The Court erred in finding and deciding as follows:

"That by reason of defendant's gross negligence in failing to transmit and deliver said message immediately, as by it agreed, to said Lyon County Bank, plaintiffs suffered damage and loss in the amount of the value of said draft, to wit, eleven thousand two hundred and fifty dollars; and that neither the whole nor any part thereof has been paid to plaintiffs, or to either of them, or at all."

XVII.

The Court erred in giving and rendering judgment in said cause in favor of the plaintiffs and against the defendant.

XVIII.

The agreement between Pitt and Campbell and plaintiffs herein, being plaintiffs' exhibit No. 1, was an absolute contract by the terms of which said plaintiffs herein were obligated to purchase 625,000 shares

of the capital stock of the Kennedy Consolidated Gold Mining Company referred to therein, and the Court erred in holding and deciding that said agreement was only an option for the purchase of said shares and in giving and entering judgment for the plaintiffs herein.

XIX.

The agreement between plaintiffs and defendant under which said telegram of April 29, 1907, in suit herein, was accepted for transmission, being plaintiffs' exhibit No. 3, provided that said defendant should not be liable for mistakes or delays in the transmission or delivery of unrepeated messages beyond the amount received for sending the same. The evidence shows that said message was an unrepeated message, and the Court erred in giving and entering judgment in favor of the plaintiffs for a greater sum than the cost of sending said message.

XX.

Said agreement for the transmission of said message, being plaintiffs' exhibit No. 3, provided that this defendant was by said agreement, made the agent of the plaintiffs without liability to forward said message over the lines of any other company when necessary to reach its destination. The evidence shows that it is necessary in order to reach its destination that said message be forwarded over the lines of the Yerington Electric Company from Wabuska to Yer-

ington, Nevada. The Court erred in holding and deciding that said defendant insured the immediate transmission and delivery of such telegram and in giving judgment for the plaintiffs herein and against the defendant for any sum whatever.

Plaintiffs below contend that their contract with Pitt and Campbell was one of option only, from which they were at liberty to withdraw at pleasure, and that had the telegram been delivered on the morning of April 30th, the bank draft would have been returned to them by the escrow holder.

Defendant below contends:

(1) That the contract of purchase was absolute in character and bound Lange and Hastings, the purchasers, as provided therein, "to buy, take and receive" said shares of stock and to pay for the same. They were therefore not injured by the delay.

(2) That there was no negligence upon the lines of the Western Union Telegraph Company, *and at least no gross negligence;* and if there were any delay at all on defendant's lines, it occurred at an intermediate point and is expressly covered by the terms of the stipulation on the message blank relating to repeated and unrepeated messages, which both the State and the Federal courts have held to be valid.

Regarding the stipulation concerning the liability of the Telegraph Company for the various classes of messages, it may be proper in this introduction to state that since the decision of the Court below, the matter of the validity of such stipulations has come before the Interstate Commerce Commission which Congress, in June, 1910, for purposes of uniformity in regard to the regulations concerning interstate messages, invested with jurisdiction to determine the reasonableness of rates and rules and practices of telegraph companies engaged in such interstate business. Said Commission has given its decision, which will be hereafter adverted to, holding that such stipulation is reasonable and valid. The message in this case was sent before the act of Congress was passed, but the stipulation involved here is the same as in the case which came before the Commission, in the case referred to, namely, *Cultra* v. *Western Union Telegraph Company,* decided May 17, 1917.

Before considering the questions relating to the transmission of the telegram and the rights and liabilities of the parties under the message contract, we will first refer to the nature of the agreement between the plaintiffs and Pitt and Campbell, for the purchase of the mining stock in question, and the extent of plaintiffs' obligations thereunder.

THE CONTRACT OF LANGE AND HASTINGS WAS AN ABSOLUTE AGREEMENT FOR THE PURCHASE OF THE STOCK, FROM WHICH OBLIGATION THEY COULD NOT BE RELIEVED BY THEIR OWN DEFAULT.

If the agreement had merely provided that the first parties agreed to sell for a price named and upon terms stated, and that the "rights of all parties should cease and determine" upon default in payment of any installment, it would clearly be one of option. But plaintiffs' contract with Pitt and Campbell, on the contrary, provides "that said parties of the first part agree to sell " and deliver to the parties of the second part, and " said parties of the second part *agree to buy, take and* " *receive,* etc., upon the following terms and condi- " tions." Then follow the terms and conditions of payment, namely, the price to be $75,000, which shall be payable as follows: $7,500 cash upon the execution of the agreement, the remainder in installments of $11,250 each. Provision is then made for depositing the stock in escrow with the Lyon County Bank, to be delivered upon final payment, the further provision constituting the bank the agent of the *first parties* to receive the payments and grant acquittances therefor, and then the forfeiture clause, which the Court held converted the contract into one of option, which we contend was error. This clause, which we believe is only the usual form of forfeiture clause inserted in contracts for the benefit of the vendor, does not provide that in default in payment the rights of the parties

shall cease and determine, but that in the event of any default in payment (1st) the bank shall be authorized to return the stock; (2nd) that all previous payments shall be forfeited, and (3rd) "that *thereupon* all rights of each of the parties hereunder shall forever cease and determine."

The construction which the Court put upon the contract we respectfully contend renders meaningless the agreement of the purchasers to "buy, take and receive" the stock. It gives the contract the same meaning it would have if that covenant were not in it. Under the ruling such a contract containing an agreement to buy, would impose no greater obligation upon the purchaser than does a contract which does not contain such agreement; by such ruling such covenant to buy and pay can be left out or put in without in any manner changing the meaning of the contract. We contend, and the authorities without serious exception hold, it is that clause, and not the forfeiture clause which determines whether the agreement is a contract to buy, or a mere option or privilege to buy.

If the Pitt and Campbell contract, without other alteration, had been only an agreement to *sell,* and Lange and Hastings had failed to make the payments, as prescribed, the seller would have had no other remedy than to retake the stock; but by the insertion of the covenant to "buy, take and receive" the stock, the seller was given the option upon default to enforce that agreement, or to recover the stock. If the pur-

chaser agrees to buy and to pay the price named, he cannot relieve himself from this obligation by failing to do it. This has been the uniform interpretation put upon forfeiture clauses in contracts which contain the absolute obligation to buy.

THE RIGHTS OF THE PARTIES UNDER THE TERMS OF THIS AGREEMENT CEASED NOT UPON THE DEFAULT IN PAYMENT, BUT UPON THE RETURN OF THE STOCK.

The bank was not directed nor compelled to return the stock upon default in payment; it was only given authority to do so. The previous payments made by the purchasers would not be forfeited under the contract until the sellers had reclaimed the stock. The words of the contract "that thereupon all rights, etc., shall cease," do not relate to the default in payment but to the return of the stock. We interpret the transaction to mean that Lange and Hastings by their contract agreed that if payment was not made, Pitt and Campbell would then have a right to retake the stock, and in such case the bank was authorized to deliver it, and "thereupon all rights of the parties should cease." Certainly the purchasers, who were not in default, could not direct the bank to return the stock. That right was with the seller. If all the rights of all the parties ceased upon the default in payment, *then even the right of Pitt and Campbell to the return of the stock ceased.* If the purchasers failed to make a payment which was due on the first day of month, then

the sellers, under the construction given the contract, could not on the 2nd, nor the 3rd, nor at any time thereafter, claim the stock, because, as argued, their rights had ceased upon default in payment. Clearly, they had the right to receive the stock, and *this right was derived from the contract* and could be exercised at any time *after* the default in payment. The stock was delivered to the bank and was *endorsed.* The bank had no authority to deliver to any one, except under the contract. Upon default in payment the bank was authorized to deliver the stock, but the rights of the vendors under the contract did not cease upon default in payment. It would cease only after they had received the stock and thus worked the forfeiture of the previous payments. The contract provides that *thereupon* the rights of parties cease. Until then the plaintiffs were under contract to buy, because by the terms of the contract *they had agreed to buy* and the payment on April 30th was a payment they were obligated by the contract to make.

This is important because there is no evidence that the stock has ever been returned to Pitt and Campbell or that they had ever demanded its return. It was found that plaintiffs made no further payments, but there is no evidence that Pitt and Campbell refused or would refuse further payments, or had terminated the contract by retaking the stock.

VENDOR COULD NOT ESCAPE OBLIGATION TO CONVEY BY FAILING TO CONVEY.

If this contract had provided that in the event of the default of *either* of the parties in performing *any covenant contained therein,* "all rights of each of said parties hereunder shall forever cease and determine," it would probably not be contended, and certainly has not been decided, that upon the full payment of the purchase price, the sellers could relieve themselves from the absolute obligation to convey by failing to convey. It may be, as was said in the opinion, that individuals might have the right to so contract if they saw fit, but the courts will not ordinarily construe such contracts to have intended such results, nor hold that in any case a party to a contract can be relieved of his own obligation by merely failing to perform it, or that he can in any way claim an advantage through his own default. An obligation which may be rescinded by either party at his pleasure is not a contract at all. Of course, where there is no agreement *to buy,* there is no failure to perform.

We will illustrate our contention concerning the construction of this contract in another way. If the payment due on or before May 1st had been delayed, and had not been offered at the bank until May 2nd, Pitt and Campbell would have had the undoubted right to demand the return of the stock and the bank, by the terms of the contract, would have been authorized to deliver it, and if the bank had returned it under

such circumstances, the rights of all the parties would "thereupon" have ceased. But if the purchasers had offered payment on the 2nd day of May before the stock had been returned or demanded, it is clear they would have had the privilege of paying, for the rights would not have yet been cut off or have ceased or have been determined by the return of the stock. Certainly the right of Pitt and Campbell, under the contract, to receive the stock would not cease until they got it, for if it did then they would have no right to demand its return. They would have no right to demand it, if their rights had ceased.

THE FEDERAL AND STATE AUTHORITIES ON THE CONSTRUCTION OF SIMILAR CONTRACTS.

There is an abundance of cases reported relating to contracts in which the forfeiture provides that upon default in payment the rights of the *purchaser* shall cease, or that the contract shall be null or void at the *election of the vendor*. These authorities are of no value here. In our review of the cases, we have cited only those which provide that upon such default *all the rights of the parties* shall cease or such contract be void and of no effect.

In the recent work of *James on Option Contracts,* the author, at Section 109, under the topic of "Option Distinguished From Agreement of Sale," states the rule as follows:

"Where the parties mutually stipulate the seller

> to sell and the buyer to buy, and it is further stipulated that if the buyer fails to perform, he shall forfeit certain payments made and the agreement shall be void, the instrument should be construed as an agreement of sale, that is, as binding upon the vendee to purchase and the forfeiture clause as a penalty and, therefore, for the sole benefit of the vendor. Otherwise it would be within the power of the vendee, by his own default, to terminate the agreement without liability to the vendor."

In

Stewart v. *Griffith,* 217 U. S., 323,

the forfeiture clause was fully as comprehensive as in the present case. The question here involved is exhaustively considered and especially the meaning and effect of such clause in connection with the *covenant of the purchaser to buy*. The contract in that case provided:

> "If such balance be not paid on a specified date, the amount paid is to be forfeited and the contract of sale and conveyance to be *null and void and of no effect in law."*

The chief consideration of the Court was to determine whether the contract did contain *an obligation to buy*. Without that covenant the contract would be construed to be void as to both parties.

With such agreement it would be void at the election of vendor. The Court says (p. 328):

"It is said that the *defendant made no covenant,* and therefore was free to withdraw if he chose to sacrifice the $500 that he had paid. This contention should be disposed of before we proceed to the other questions in the case."

and, p. 329:

"The tenor of the 'agreement' throughout imports *mutual undertakings.* The $500 is paid as 'part purchase price of the total sum to be paid'; that is, *that the purchaser agrees to pay.* The land is described as 'being sold.' There are words of present conveyance, inoperative as such, but implying a concluded bargain, like the word 'sold' just quoted."

and again, p. 329:

"Here is an absolute promise in terms which it would be unreasonable to make except on the footing of a similar promise as to the main parcel that the purchaser desired to get. *We are satisfied that Stewart bound himself to take the land.* See *Wilcoxson* v. *Stitt,* 65 Cal., 596, 52 Am. Rep., 310, 4 Pac., 629; *Dana* v. *St. Paul Invest. Co.,* 42 Minn., 195, 44 N. W., 55. The condition plainly is for the benefit of the vendor, and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word 'void'

means voidable at the vendor's election, and the condition may be insisted upon or waived, at his choice. *Knickerbocker L. Ins. Co.* v. *Norton,* 96 U. S., 234, 24 L. ed., 689; *Oakes* v. *Manufacturers' F. & M. Ins. Co.,* 135 Mass., 248, 249; *Titus* v. *Glenn Falls Ins. Co.,* 81 N. Y., 410, 419."

One of the leading cases which has been widely quoted is

Wilcoxson v. *Stitt,* 65 Cal., 596.

Quoting from the decision in *Mason* v. *Caldwell* (p. 598):

"The defendant contends that he can take advantage of this clause, and because he did not pay the money as he had agreed to do, he is exonerated from paying it at all. It is argued that because the obligee, in the event of non-payment, may treat the bond as determined, mutuality requires that the obligor should have the same privilege. This argument refutes itself. It is as much a *felo de se,* as it would make the bond. To admit the defendant's position is to leave everything in his own hands. It allows him to defeat, or make the bond operative, as may best subserve his interests, without any discretion on the part of the obligee. It converts the bond into a naked proposition, absolutely binding on the seller, but which the purchaser may accept or reject by the payment or non-payment of the money. By thus putting the entire control in the hands of the latter, all mutuality is destroyed. *It was the undoubted inten-*

> *tion of both parties when they inserted this clause to provide a penalty to insure a prompt performance by the purchaser."*

The contract in the Wilcoxson case provided that upon *default of payment,* "this agreement shall be void." The contract under consideration provides that in default in payment the bank shall be *authorized to return the stock* and the previous payments shall be forfeited, and "thereupon" all rights of each of the parties shall cease. A contract becomes void when the rights of the parties thereto have ceased, and conversely when rights of all parties have ceased, the contract has become void. The terms are synonymous. If in the Wilcoxson case the contract was merely voidable at the election of the vendor, the same meaning must be ascribed to the equivalent expression in this case, and the rights of the parties hereto be held to "cease and determine" at the election of the seller and not of the party who is in default.

In *Central Oil Co.* v. *Southern Refining Co.,* 154 Cal., 165, there was a mutual agreement to buy and to sell certain quantities of oil upon conditions of payment specified, as in the present case. The contract contained this clause:

> "The violation of any of the terms or conditions thereof by *either* party hereto shall work a forfeiture hereof. This agreement shall thereupon become void and of no effect."

This is the type of agreement above referred to, where, under plaintiffs' contention, it would be just as permissible for the seller after full payment, to be relieved from his obligation to convey, by refusing to convey, as it would be for the purchaser to be relieved from his obligation to pay by refusing to pay.

The defendant, the Southern Refining Co., refused to take or pay for oil and the plaintiff sued for breach of the contract. The Court says (pp. 166-167):

> "Upon appeal appellant's first and principal contention is that by force of the terms of the contract itself, when defendant violated it, the agreement became 'void and of no effect'; that this provision means that the violation terminated the contract and that consequently plaintiff had no right of recovery under it. Clearly appellant misconstrues the force of the language upon which it relies. That language means that by a violation of the terms of the contract the rights of the party violating it cease, and as to that party and to that extent, the agreement becomes void and of no effect. It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for *'a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all'* (9 *Cyc. of L. & P.*, p. 618). Per-

formance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party (*Civ. Code,* secs. 1511, 1512, 1514). Such has uniformly been the construction put upon language such as this when found in contracts."

In *Weaver* v. *Griffith* (Pa.), 59 Atl., 315, the forfeiture clause was even stronger than in the present case, because it provided that upon *default in payment only,*

"The agreement is to be null and void *and all* parties are to be released from *all liabilities* hereunder and all money previously paid forfeited."

There is no right without a corresponding liability. The Court in the Pennsylvania case held that the failure to make the payments at the stipulated times *did not of its own force terminate the contract.* As the opinion is in one paragraph and is confined to the construction of the above clause of the agreement, it is quoted here in full:

"The defendant might have terminated the contract under the clause that 'In case the said party of the second part doth not make payment as above specified at the time herein stated then this agreement is to be null and void, and *all* parties are to be released from *all* liabilities herein and all

money previously paid forfeited.' But the failure to make the payments at the stipulated times did not, *of its own force, terminate the contract.* It was not one of option, but of sale and purchase, and *prima facie* the time of payment was not of its essence. While a contract may provide that it shall be terminable at the will of either party, so that a purchaser may even terminate it by his own default, yet such effect will not be given to it unless the intent of both parties to that effect be made apparent by clear, precise, and unequivocal language. The presumption is that the forfeiture clause is for the benefit of the vendor, and enforceable at his election. Without such election and action the purchaser would not be released from his obligation to pay, and equally the vendor would continue to be bound by his agreement to sell. In the present case the court below found as a fact that the defendant had not elected to enforce his right of forfeiture, but by his conduct had substantially waived it. Thus retaining his right to enforce the contract against the purchaser to buy, he equally kept alive his own obligation to sell.

"Decree affirmed."

It will be remembered that the agreement with Pitt and Campbell under consideration does not even provide that the rights of the parties should cease on failure to pay, because very important rights were still to be exercised. It, in effect, provided that the rights should cease upon the return of the stock, which the evidence *does not show has ever been re-*

turned, or that the vendors took any action to forfeit the previous payment. Under the Weaver case, *supra,* even if the contract in suit had provided that the rights of the parties should cease upon failure to pay, the contract would not "of its own force" have been terminated. The option in such case would be with the seller.

In *Vickers* v. *Electrozone Co.* (N. J.), 48 Atl., 606, the Court was construing a provision of the contract:

> "By force of which (in terms) the failure by the party of the second part to perform the agreement *ipso facto* puts an end to it,"

and said:

> "It would be an extraordinary construction of this agreement to make it confer upon a party the power to make his own default in not performing his part of the agreement the discharge of his obligation to perform it."

We also call the Court's attention to the language of the courts in the English cases cited in this opinion.

Also in the case of

Hamburger v. *Thomas,* 118 S. W., 770,

the Court in construing the forfeiture clause, had first to determine whether the contract contained an agreement to buy. The option clause provided that if the title to said property, in the opinion of the purchasers, was good and said property was not taken within

the time specified "then the $1000 herein receipted "for shall be forfeited to W. W. Thomas and our-"selves equally as liquidated damages, *and this receipt "shall then be null and void and all parties herein "named released."* The Court held that the contract was not an option but a contract of sale which could be enforced by either party. It is said (p. 773):

> "This is not a mere 'option' by which is meant a contract by which the owner of the property agrees with another that he shall have the right to buy his property within a certain time. By this (meaning an option) the owner does not sell his property nor agree to sell it, but sells simply the right or privilege to buy at the election of the other party (citing cases). But, as is before said, it is a contract of sale. It shows a contract which, upon its breach, the other can enforce."

The rule in regard to insurance contracts is that the usual forfeiture clause providing that upon the failure to pay the premiums at the time stated, the contract is to be null and void, is a provision inserted for the benefit of the insurer who may waive it and enforce the contract. In the case of

> *Knickerbocker Life Ins. Co.* v. *Norton,* 96 U. S., 234,

the policy contained this provision:

> "If the said premium shall not be paid, etc., at the time the same shall become due and payable,

> then and in every such case, the company shall not be liable to pay the sum assured, nor any part thereof; and said policy shall *cease* and be null and void without notice to any party or parties interested herein."

It was held that the clause was intended for the benefit of the insurer and that the company was not bound to insist upon the forfeiture but might waive it.

At the argument of the case below, *plaintiffs* relied chiefly upon the cases of

> *Gordon* v. *Swan,* 43 Cal., 564, and
> *Williamson* v. *Hill,* 27 N. E., 1008.

Gordon v. *Swan* has no application because there was no obligation to buy.

For the same reason the case of *Williamson* v. *Hill* has no application. The Court says that:

> "The stipulation that a payment of $100,000 at any time within two years might stand instead of $250,000 to be paid year by year indicate that *this was not considered an absolute sale."*

We respectfully contend that the contract did not provide that the rights of the parties should cease upon the failure to make payment, but that the clause under consideration was inserted for the benefit of the sellers who had the option to direct the return of the stock, and thus cause the forfeiture of previous payments, and "thereupon," that is, upon the for-

feiture of payments and return of stock, "the rights of each of the parties should forever cease and determine."

THE DEFENDANT IS NOT LIABLE IN THIS CASE, EVEN IF THE CONTRACT WERE ONE OF OPTION ONLY.

Assuming even that the contract was one of option, the *vendors* were bound thereby until default made. It was a *continuing offer* of sale to plaintiffs until May 1st when the next payment was due. This offer was accepted by the mailing of the bank draft on April 27th, and the letters of transmissal to the escrow holder advising the bank which was *"the constituted agent of said parties of the first part for the purpose of receiving any and all payments,"* that the draft was sent for the purpose of making the payment. The acceptance of this offer of sale could be made by post, and the contract to buy became complete and binding when the letter of acceptance was mailed. Any subsequent attempt to withdraw the acceptance was ineffective.

Sections 1582 and 1583 of the Civil Code of California codify the general rule in regard to the acceptance of proposals. Under these provisions the consent is deemed to be fully communicated between the parties as soon as the party accepting the proposal has put his acceptance in the course of transmission by any reasonable and usual mode.

In *Burton* v. *U. S.*, 202 U. S. 384, it is said:

> "It is to be taken as settled law, both in this country and in England, in cases of contract between parties distant from each other, but communicating in modes recognized in commercial business, that, when an offer is made by one person to another, the minds of the parties meet and a contract is to be deemed concluded, when the offer is accepted in reasonable time, either by telegram, duly sent in the ordinary way, or by letter, duly posted to the proposer, provided either be done before the offer is withdrawn, to the knowledge of, or upon notice to, the other party."

In *Brauer* v. *Shaw* (Mass.), 46 N. E., 617, the syllabus is as follows:

> "An offer by defendants to let cattle space in a steamship, subject to prompt reply, was wired at 11:30 a. m., and received by plaintiff at *12:16* p. m. At 12:28 p. m. plaintiff telegraphed an acceptance, which did not reach defendants till 1:20 p. m., and in the meantime, at 1 p. m., the latter wired a revocation, which plaintiff received at 1:43 p. m. *Held, that defendants were bound.*"

It is not necessary that the proposal should have been made by mail to justify an acceptance in that manner. Where the parties are distant from each other, as in this case, the mail was the reasonable and usual mode of communication.

"Posting an acceptance of an offer may be suf-

ficient when it can fairly be inferred from the *circumstances of the case* that the acceptance might be sent by post."

Beach on Modern Law Contracts, Sec. 61.

If thereupon the contract was not in itself an absolute agreement to buy, the agreement became absolute upon the mailing of the acceptance of the offer on April 27th.

THE BANK DRAFT BECAME THE PROPERTY OF THE ADDRESSEE WHEN IT WAS DEPOSITED IN THE MAIL AND THE BANK HAD NO AUTHORITY TO RETURN IT.

Plaintiffs argued this case upon the assumption that the payment was not complete until Pitt & Campbell had themselves received the money, or the credit, from the escrow holder. But it was immaterial to the rights of plaintiffs when the vendors actually received the money or the credit. Plaintiffs would have lost no rights if Pitt & Campbell had not been paid at all. By the terms of the contract, the "said Lyon County Bank is hereby constituted the agent of said parties of the first part for the purpose of receiving any and all payments." Payment to the agent was payment to the principals. It was not necessary to await any bookkeeping entries by the bank. If the draft, when it was deposited in the mails, or even when it came into the actual custody of the bank, became the property of the bank

as the addressee, it then became the property of the principals. The telegram requesting its return, had it been promptly delivered, would not have changed the legal relation of the parties. The bank would have had no authority to return the draft, *and the officers of the bank testified they would not have returned it.* The draft was intended to be used for payment. It was treated as coin. The draft was not cashed but was itself credited on the agreement. Plaintiffs are estopped from saying it was not worth its value, or was not intended for payment. When it came into possession of the bank, Pitt & Campbell could not have forfeited the contract because payment was not made. Plaintiffs' own evidence showed the draft was treated as gold coin. See Deposition of Assistant Cashier Geo. F. Willis, "read by plaintiffs' counsel as a part of their case" (Tr., 108).

THE AUTHORITIES.

On the proposition that the letter and its contents, when deposited in the mail, became the property of the addressee. In *22 Am. & Eng. Enc. 1057,* it is said:

> "After the letter is placed in the post office it passes out of the control of the sender and into that of the person to whom it is directed, and the postmaster or post office department is his agent to forward the letter to him. The right of the

addressee being a property right, he cannot be deprived of it except by due process of law."

U. S. v. *Thayer,* 154 Fed. 508, is directly in point. The defendant mailed a letter soliciting a subscription for a political purpose, addressed to an officer of the United States in the building occupied by him in discharge of his official dutes, all in violation of the federal statute. The Court said (p. 511):

> "When, in contemplation of law, did the letter cease to be the property of the defendant, and for whom was the post-office establishment acting in forwarding and delivering it? By quite a uniform line of decisions it is held that after a letter is placed in the post office it passes out of the control of the sender and into that of the person to whom it is directed, and the postmaster or the Post-Office Department is his agent to forward the letter to him. 22 American & Eng. Enc. of Law (2d Ed.), 1057; *U. S.* v. *Nutt,* Fed. Cas. No. 15,904; *Com.* v. *Wood,* 142 Mass., 459, 8 N. E. 432; *Regina* v. *Jones,* 4 Cox, C. C. 198; *Kennedy* v. *Dr. David Kennedy Corp.,* 32 Misc. Rep. 480, 66 N. Y. Supp. 225. If this be true, defendant was not the owner and had no control over the letter after it was confided by him to the mails of the United States Thereafter it was the property of the addressee, and in the possession of his agent for forwarding.

To the same effect is

U. S. v. *Nutt,* Fed. Cas. No. 15904;

Commonwealth v. *Wood,* 104 Mass., 459;

Kennedy v. *Dr. David Kennedy Corp.*, 66 N. Y. Supp. 225.

The case of

Patrick v. *Bowman*, 144 U. S., 411,

is frequently cited but the facts were somewhat complicated by reason of the number of letters and telegrams which were exchanged between the parties, some of which were never received. The following rule stated in the syllabus (L. ed.) was applied:

> "Where an offer is made and accepted by the posting of a letter of acceptance before a notice of withdrawal is received, the contract is not impaired by the fact that revocation had been mailed before the letter of acceptance."

For the above reason, the bank, had it received the telegram would have had no authority to return the draft. The contract was absolute, and, if not, the draft and letters of transmissal became the property of the bank as the authorized agent to receive payment, and were therefore the property of the principals.

THE ALLEGED PRIVATE ARRANGEMENT WITH THE BANK.

Defendant respectfully contends that the Finding VI that the arrangement about making payments by draft was made after the execution of the contract, is not supported by the evidence, but that it was

intended by the plaintiffs that the bank draft itself should be applied in payment upon the contract. The deposition of George F. Willis, the officer of the bank who conducted the transaction, and which was read in evidence by plaintiffs' counsel, as a part of their case (Tr., 108) shows, that the conversation about the form of future payments was had "at the time the contract was made" and not afterwards. The first payment, as the contract shows, was made at the time of "the execution of the agreement," and the reference to the future payments and the conversation referred to occurred at that time. Mr. Willis testified (Tr., 110-111):

> "I had explained to him that *as we treated their San Francisco exchange as cash,* crediting Pitt & Campbell up with *it* immediately on receipt of the same, we should have some exchange, etc." (Tr., p. 112).

Plaintiffs contend that the letter and telegram in suit only related to this alleged "private" arrangement for the cashing of the draft. The contention is contradicted by the *pleadings,* the *letters of transmissal,* the oral *evidence,* plaintiffs' witness and the *Stipulation of Facts.*

THE PLEADINGS.

There is nothing of this private agreement in the pleadings. The complaint alleges that the bank draft was sent, not for the purpose now claimed, but "for the purpose of *making the payment* mentioned in said contract between the plaintiffs and said Pitt and said Campbell" (Tr., p. 6), and, again, it is alleged "that for the purpose of making said pay-" ment, they had mailed from Oakland to said Lyon " County Bank, at said Town of Yerington a certain " bank draft in the sum of *$11,250, gold coin* of the " United States, payable to order of said Lyon Coun-" ty Bank," which was the escrow holder (Tr., p. 8). It is further alleged that "said draft was worth $11,-250, *gold coin,* and would have been honored" (Tr., p. 6). It also appears that it was intended that the said *draft* mailed to said Lyon County Bank should *itself* be *"credited by it to account of said Pitt & Campbell"* (Tr., p. 7).

THE LETTERS.

The letters from plaintiffs transmitting the draft did not refer to any arrangement that had been made for advancing gold coin under privte agreement with the plaintiffs which the bank, as plaintiffs' agent, was to pay to Pitt & Campbell. On the contrary, the letters state that the draft was sent for the pur-

pose of making the payment. The letter accompanying the draft, which was registered, stated:

> "Enclosed herewith we hand you draft for $11,250 issued by Bank of Fruitvale on First National Bank of San Francisco, *to apply on escrow you hold from J. U. Hastings and myself and Messrs. Pitt & Campbell.* The banks here assure me they will not charge any exchange."

The letter of the same date from plaintiffs advising that the draft had been mailed, read as follows:

> "We this day forwarded you by registered mail a draft for $11,250 *to apply on payment due you under* ESCROW to Messrs. Pitt & Campbell and ourselves."

THE EVIDENCE.

Mr. Willis, who handled the escrow matters for the bank, testified as follows (Tr., p. 111):

> "Q. Did you treat the draft so received as gold coin?
>
> "A. We did. We credited *it* up immediately."

THE STIPULATION.

The Stipulation of Facts, paragraph 9 (Tr., p. 70) recites:

> "That on April 30th, 1907, and after the bank draft referred to in plaintiffs' complaint was received by the Lyon County Bank, said Bank, *as*

> *was intended by the plaintiffs in forwarding the same, treated said bank draft as gold coin,* as explained by the evidence in the cause, and gave credit for the amount thereof to plaintiffs herein upon the escrow agreement."

It will be seen from the above that the bank did not handle the draft in the manner now contended by plaintiffs' counsel, and it was not sent in pursuance of any private arrangement with the bank to advance gold coin to Lange and Hastings and then, acting for Lange and Hastings, pay the gold coin to Pitt & Campbell. The draft was sent *to apply on the agreement for the purpose of making payment,* and was by the bank credited on the escrow agreement exactly according to instructions. Pitt & Campbell never did receive the gold coin, and if, as contended, payment could not be made through any other medium, plaintiffs' claim must still be against the bank.

If, by means of this bank draft, which it is alleged was worth the amount thereof in gold coin, plaintiffs undertook to make the payment which was due, intending the draft to be credited upon the escrow agreement, it is not for plaintiffs to contend that the payment was irregular, or that the contract had not been complied with. If the act of plaintiffs in sending the draft *to make the payment, was sufficient to have bound the plaintiffs if the alleged private arrangement had not been made, then the making of such private arrangement would not change the rela-*

tion of the parties. If the pleadings and the written evidence explaining the purpose of the draft had shown that it was not intended to be received in payment, but that it was sent for the purpose of providing a fund which the bank was to set apart and then pay to Pitt & Campbell, the alleged private arrangement may have had some bearing on the case, but the complaint in the case is not based upon that theory and the evidence refutes it. If the telegram had been sent for the purpose now contended, defendant should have had an opportunity to traverse the pleading and try the case upon that issue.

Plaintiffs allege that if the telegram had been received the draft would have been returned. The bank officials, witnesses for plaintiffs, whose depositions were taken, deny this and say that they would have held the draft. The escrow agreement provides that the bank is constituted the agent of Pitt & Campbell to receive the payment. The officials testified that the draft was treated by them as *gold coin* and *credited on the agreement.* The complaint and the letters transmitting the draft state that it was sent for that purpose. The telegram was not intended to prevent the bank from coming into possession of the draft, but it was assumed that the bank would receive it; so the situation is practically the same as if plaintiffs had sent gold coin, or its equivalent, to Pitt & Campbell themselves, but had telegraphed them to return it upon its receipt. The money or

draft, upon its receipt, became the property of Pitt & Campbell. Our contention is that Pitt & Campbell acquired the title to the draft when it was deposited in the mail, but certainly when it came into the actual possession of the agent appointed to receive it.

QUESTIONS RELATING TO THE TRANSMISSION OF THE TELEGRAM IN SUIT ARISING OUT OF THE STIPULATIONS UPON THE MESSAGE BLANK.

Plaintiffs count upon an alleged *contract of insurance* of immediate delivery and then allege negligence in the breach of this *insurance contract.* The complaint alleges in the first count the contract with Pitt & Campbell, the mailing of the draft "to apply upon the payment," the sending of the telegram, the explanation to the agent as to its purpose, and then alleges "that thereupon said defendant, *through its* said agent, *represented to said plaintiffs that defendant would insure the immediate delivery of said message,"* for a given consideration, and *"plaintiffs thereupon accepted said proposal* of said defendant to transmit said message immediately *and to insure its immediate delivery* as aforesaid" (Tr., p. 10). It then charges that the defendant negligently delayed the transmission and delivery, contrary to the agreement. In the second count of said complaint it was alleged (Tr., p. 17),

"that said defendant would *insure* plaintiffs against

> all *loss or damage* that they might sustain arising out of any failure on the part of defendant to immediately send or immediately deliver said message to Lyon County Bank; that thereupon plaintiffs paid the defendant the sum of one and forty-five (1.45) hundredths dollars for the immediate sending and immediate delivery of said message and for the *insurance* thereof as *herein stated,* and delivered said message to the defendant which received the same under agreement that it would immediately send and immediately deliver the same to said Lyon County Bank at Yerington, Nevada, and that it would *insure* plaintiffs against all *loss or damage* that they might sustain arising from any failure on the part of defendant."

The plaintiffs have here alleged, and said action is based upon, an oral contract of *insurance against loss or damage* for failure to make immediate delivery of a correctly transmitted copy of said message. We respectfully urge that a finding based upon such oral agreement of insurance was error.

The message was sent under a written contract which is binding upon the parties and directly opposed in terms to the oral contract pleaded and found. See Finding XI, Tr. 53-55, setting out said written contract. It is here provided that the message was sent subject to thes~~e~~ terms thereof *which are agreed to.* This agreement provides that as to *insured messages,* the contract shall be in *writing,* and a certain premium paid in addition to the cost of transmission, and that *"no employee of the com-*

pany is authorized to vary the foregoing." It is therein provided that the premium for insurance upon such a message against loss or damage in the amount claimed by plaintiffs would have been *$112.50,* in addition to the cost of transmission. Plaintiffs were charged with notice of the terms of this agreement. *Primrose* v. *Western Union Tel. Co.,* 154 U. S. 1; see page 25. Plaintiffs claimed an *oral* contract of insurance against loss or damage in consideration of the payment of $1.45, which was the cost only of a repeated message. Plaintiffs were advised by the terms of the written contract that defendant's agent had no authority to enter into such oral agreement.

It was contended, however, that by the written contract, the provision for insurance relates only to the transmission of the message. But a message is not transmitted correctly, nor transmitted at all, until it is received by the addressee. The agreement to transmit a message involves the obligation to deliver. The provision of the message blank, relating to insurance, is clearly intended, when the premium is paid, to impose upon the telegraph company the obligation to deliver to the addressee a correct copy of the message. The delivery of an incorrect copy of a message though the same had been correctly transmitted would be a violation of the agreement; certainly therefore, it would not be contended that no delivery at all would be a compliance with it.

If the company accepted a premium of $112.50 in consideration of the insurance of "correctness in the transmsision of a message" and failed to make any delivery at all, it would not be heard to say that it never insured the delivery but only the transmission.

WHERE A MESSAGE MUST BE SENT OVER A "CONNECTING LINE" IN ORDER TO REACH ITS DESTINATION, THERE IS NO AUTHORITY IN THE AGENT TO INSURE EITHER CORRECTNESS IN TRANSMISSION OR DELIVERY.

The message contract provides (Tr. 54): "And this " company is hereby made the agent of the sender, *with-" out liability,* to forward any message over the lines " of any other company when necessary to reach its "destination."

It is stipulated in the Agreed Facts, paragraph 1, Tr. 67, that Wabuska

> "was the terminus of the Western Union Telegraph Company's lines for Yerington messages . . . and in order to transmit the telegram in suit by telegraph or telephone beyond Wabuska, *it was necessary* that it be forwarded from that point over the line of the Yerington Electric Company to Yerington."

It is here admitted that it was necessary for the message to be sent over a connecting line and the written agreement provides that in order to forward such message, "this company is hereby made the agent of the sender, *without liability.*" Plaintiffs were here advised, and by said written contract in terms

agreed, that defendant's agent had no authority to incur liability under the so-called oral contract of insurance to deliver a message which had to be forwarded over a connecting line in order to reach its destination.

THE ABOVE CLAUSE IN THE MESSAGE CONTRACT PROVIDING AGAINST ANY AGREEMENT FOR LIABILITY WHEN THE MESSAGE IS TO BE FORWARDED OVER A CONNECTING LINE, IS VALID.

Jones on Telegraph and Telephones, Sec. 404;
Crosswell on Electricity, Sec. 444;
Western Union v. *Carew,* 15 Mich., 525;
Pennsylvania R. R. v. *Jones,* 155 U. S., 333.

The Company's agent was not authorized, and never intended, to make any contract of insurance. Witness Quinn testified that he suggested that the words "Deliver immediately" be written upon the face of the message, because, in his opinion, it would have more of a tendency to insure a hurried delivery than the word "Rush," but he charged for these words. Aside from any lack of authority vested in the clerk to enter into an oral contract of insurance of immediate delivery binding on the company, it is evident, from the testimony, that if anything was said about insurance at all, it was not understood by the parties in the same sense. Under the circumstances, there could have been no contract of insurance in the sense of an agreement for indemnity against loss or damage. If

Quinn used the term at all, it could only have been in the sense of giving some assurance of expedition and not the making of a contract of indemnity. The written contract controls. The plaintiffs were charged with notice that a contract of insurance could not be made except in writing, and upon the terms prescribed. We respectfully urge that the finding that the defendant's agent entered into an oral contract of insurance against loss and indemnity is not supported by the evidence.

If the alleged oral contract to insure plaintiffs against all loss and damage, in consideration of $1.45, paid by mistake if at all, is upheld in the face of the terms in the written contract between them, then there can be no security for the Company in such regulations, for whenever parties choose to testify such oral contract was made, and the courts believe them, *the written agreement is swept away,* and the right which the law gives to the carrier to adopt reasonable regulations is annulled.

THE GENERAL TERMS OF THE MESSAGE CONTRACT.

The printed stipulation on the message blank on which the plaintiffs in their own office prepared the message, provides for three classes of messages: "unrepeated," "repeated" and "insured," with a different rate and a different degree of responsibility for each class. It was optional with the senders of the message as to which class they would adopt. Plaintiffs claimed

they "put themselves in the hands of the agent" to abide his instructions. They had no more right than any other person sending messages to put themselves in the hands of the clerk. They had no right to a different service or to demand in their case a departure from the regular method of transmitting messages. Most telegrams are important. That is the reason the different classifications are made, giving the senders the option to select for themselves. The clerk had no authority to make a special rule, or to discriminate in favor of some particular person. There is no private or secret way by which plaintiffs could have their message transmitted by "putting themselves in the hands of the agent." All the receiving clerk can do is to receive the message and forward it according to the classification which the sender selects.

The toll on this message as an unrepeated message, assuming that pennies were not in use at that time, was $1.00; and as a repeated message, was $1.45. The premium for sending the same message as insured, "against all loss and damage they might sustain," according to the terms of the printed agreement, is $112.50. There was a dispute between plaintiff Lange and defendant's agent Quinn, as to the amount paid. Lange contended he paid $1.45. Quinn testified that he paid only $1.00. The Court found he paid $1.45. The message, therefore, was sent and paid for either as a repeated message or as an unrepeated message.

The oral testimony of the plaintiff upon which was based the finding of the Court that the message was sent as an *insured message,* or by which the defendant insured the plaintiffs against "all loss or damage they might sustain," was in conflict with the written contract. Plaintiff Lange testified that defendant's agent not only made a verbal contract of insurance but as evidence of it, wrote the words "Deliver immediately" upon the face of the message. Defendant's agent Quinn, as above noted, testified that he wrote the words "Deliver immediately" upon the face of the message because he thought it would tend to hurry the delivery and would be more effectual than the usual word "Rush."

THE FINDING OF GROSS NEGLIGENCE IS NOT SUPPORTED BY THE EVIDENCE.

The finding of gross negligence is based upon the assumption that the draft was paid because the message was delayed *three days* and that a delay of three days is gross negligence. But it was not the delay of three days which caused the alleged loss if at all; it was the delay of only a few moments, or, at most, not more than one hour, on the morning of April 30th. The Yerington office was not a night office. The message could not be delivered until morning. The testimony of plaintiff Hastings was that the company's agent "said that the message would be delivered without fail before banking hours the next morning" (Tr., 102). The

office opened about seven o'clock A. M., but messages accumulating during the night at Wabuska had to be transmitted and delivered in turn. It should have been delivered when the bank opened at 8:30 A. M., at which time the bank received its mail. If the message was to accomplish its purpose at all it was necessary for it to have been delivered, as stated in the complaint, "before banking hours the next morning." A very brief delay would have rendered the message useless. After the bank received the mail, certainly after it had credited the draft, it is immaterial whether the message was thereafter delayed three days, or was never delivered at all. Practically, therefore, the entire period of the delay of the message was after the draft had been paid. If the message had been delivered in time to intercept the draft, the delivery would have been prompt. Certainly the delay until after the bank had opened and the draft was paid was nothing more than ordinary negligence.

To illustrate: If the bank at Yerington had received its mail on the evening of April 29th, which Assistant Cashier Willis testified it might have done, or early on the morning of April 30th, the telegram, although promptly delivered, would have been ineffectual to stop payment of the draft. It would have been immaterial in such case how long thereafter the message was delayed. The draft was actually received between 8:30 and 9 o'clock. The question therefore

is, was the delay in the delivery of the message until after that hour gross negligence?

Gross negligence implies wilful misconduct or reckless indifference to the rights of others, which is not to be presumed from a failure to deliver the message immediately or, in this case, before banking hours on the morning of April 30th. In

> *Kiley* v. *Western Union Tel. Co.,* 109 N. Y., 231,

the message was delayed or not delivered at all. The Court held that the failure was not due to wilful misconduct or gross negligence. This case was expressly approved by the Supreme Court of the United States in *Primrose* v. *Western Union Tel. Co.,* 154 U. S., 1, where the Court, speaking through Mr. Justice Gray, said, in reference to the Kiley case (p. 21):

> "It was not shown that the failure was due to the wilful misconduct of the defendant or to defendant's gross negligence."

In the Primrose case itself the loss arose from an error instead of delay which, however, was charged to be gross negligence. The Court said, in this connection (p. 27):

> "The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than *ordinary negli-*

> *gence;* and that upon principle, and authority, the mistake was one for which the plaintiff, not having the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message."

In *Birkette* v. *Western Union Tel. Co.,* 103 Mich., 361, the damage was caused by delay. The facts were "that at *ten* o'clock plaintiff sent an unrepeated message to the office." "The message should have " been delivered in about half an hour, but was not " delivered until *two* o'clock P. M.—action to re- " cover damages for defendant's failure to promptly " deliver a telegram." It was held there was no gross negligence and the case came within the stipulation.

The cases of *Clement* v. *Western Union Tel. Co.,* 137 Mass., 463, and *Stone* v. *Postal Telegraph Co.,* 76 Atl., 762, were cases of delay in the delivery of telegrams which, however, was in each case not construed to be gross negligence. In *Williams* v. *Western Union Tel. Co.,* 203 Fed., 140, the negligence was in the transmission of the message. The Court said:

> "There was no evidence of wilful misconduct or that any other want of care which would raise the presumption of a conscious indifference to consequences."

In *Halsted* v. *Postal Telegraph Co.*, 193 N. Y., 293, which was an error in transmission, the Court said:

"'However occurring, if by no wilful misconduct, a mere mistake, or error, in the transmission of a message, would not warrant a jury in finding that there had been *more than ordinary negligence.'* . . . To justify a recovery in this case it was incumbent upon the plaintiffs to establish an absence of contributory negligence upon their part and *gross neglect upon the part of the employes of defendant. The onus thus imposed was not satisfied by proof of error in the transmission of the message.* . . . In the view we take of the evidence *it was the duty of the trial justice to hold as a matter of law that there was a failure of evidence to show gross negligence.* . . . The conclusions reached in this case do not tend to subject the public to the mercy of a telegraph company. While such a corporation is invested with certain privileges to be exercised by it for the public benefit, its liability must be measured by reasonable limitations. The opportunity is afforded to one doing business with it to protect himself from danger incident to error likely to arise. A failure to exercise the privilege extended at a small expense may result in a loss which might have been obviated by the injured party in the first instance. *To hold that under the facts in this case gross negligence had been established would enable a party in nearly, if not every case, to have a jury determine that a liability existed, when as a matter of fact only the absence of ordi-*

nary care was disclosed, and thus render telegraph companies liable as insurers of the accuracy of messages notwithstanding their contracts."

THE CHARACTER OF THE MESSAGE.

Plaintiffs deny that the message was a repeated message, but claim that they paid the sum of $1.45, which was the repeated message rate. Defendant claims that it was an unrepeated message and only $1.00 was paid. The Court found that the amount paid was $1.45. It must therefore have been either a repeated or an unrepeated message upon which the liability, as stipulated upon the message blank, would be either the cost of transmitting the same or fifty times the cost of such transmission. In either case the judgment would be error. We are, therefore, concerned with the validity of the stipulations upon the message blank with regard to the defendant's liability.

THE CONTRACT BETWEEN THE PLAINTIFFS AND THE DEFENDANT RELATING TO LIABILITY FOR UNREPEATED MESSAGES IS VALID AND CONCLUSIVE UPON THE RIGHTS OF THE PARTIES.

There has been much controversy throughout the various State courts over the validity of the above clause of the message contract. In some States this stipulation or agreement has been held to be void as against public policy, but the question is settled to the contrary in the Federal courts and in the courts of

California and recently by the Interstate Commerce Commission. In

Primrose v. *Western Union,* 154 U. S., 1,

the Court reviews the leading cases to this controversy and holds that the above provision of the message contract is valid, saying it is not an exemption from liability for negligence, but that "the party sending the message has the option to send in such a manner as to hold the company responsible, *or to send it for a less price at his own risk.*"

Referring to the Illinois case which advanced the principal arguments against such stipulation, the Supreme Court in the Primrose case says:

> "The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again, if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message."

It has been said that the Primrose case related to an error in transmission, which is true, and yet in view of the great conflict of authorities in various States, the

Court has given a broad discussion to the question whether the stipulation on the whole was reasonable.

But in *Western Union* v. *Coggin,* 68 Fed., 137, the damage claimed was caused *solely by delay* or failure to deliver. The Court says (p. 138-9):

> "This case was brought and tried before the case of *Primrose* v. *Telegraph Co.,* 154 U. S., 1, 14 Sup. Ct., 1098, was decided. Since the decision in that case it has been the settled law in the federal courts—First, that the conditions contained in the stipulation quoted, subject to which the unrepeated message of the plaintiffs was sent, are reasonable and valid; second, that, under these stipulations, the telegraph company is not liable for mistakes in the transmission or delivery, or for the non-delivery, of an unrepeated message beyond the sum received for sending the same;"

and the Court further says that the decision of the Supreme Court in the case of *Primrose* v. *Telegraph Co.* "silences further contention on these questions in the federal courts."

In *Clement* v. *Western Union,* 137 Mass., 463, the only negligence complained of *was delay in delivery.* With respect to the above stipulation against damages for delay, the Court said:

> "The only negligence shown in this case was the unexplained *delay in delivering* the message on the part of the messenger boy to whom it was, *after its receipt,* entrusted for delivery. It may be that the

company might be guilty of some fraudulent or gross negligence in transmitting or *delivering* a message, so that it would not be protected by its regulation from liability for actual damages, though in excess of the sum stipulated. *But the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation, and there are no principles of public policy which should prevent the company from stipulating that it will not be responsible for such negligence beyond a fixed amount unless it receive a reasonable compensation for assuming further responsibility."*

In

Birkett v. *Western Union,* 103 Mich., 363, 33 L. R. A., 404,

the damage claimed was caused *solely by delay.* The facts were that "At 10 o'clock plaintiff sent an unrepeated message to the physician." "The message should " have been delivered in about half an hour but was " not delivered until 2 o'clock P. M. . . . *Action " to recover damages for defendant's failure to promptly " deliver a telegram."*

The Court, after reviewing the authorities, says:

"It is therefore clear that in order to hold this regulation which was a part of the contract, void, we must not only overrule the decision of our own court *but must run counter to the great weight of authority."*

The Court further says, and this paragraph applies exactly to the facts of the case before the Court, assuming that the message did not reach Wabuska:

> "The question now before us is not one of neglect to transmit at all, nor of failure to deliver after receipt at the place of destination. It is a case of delay in transmission. It is obvious that such delays may occur from various causes. *There is as much reason in stipulating against such delays as there is against inaccuracies in the message. The demand for its repetition is a notice of its importance, and the necessity for promptness, additional to the language of the message itself.*"

The case of

Stone v. *Postal Tel. Co.* (R. I.), 76 Atl., 762,

was an "action by *M. M. Stone & Co.* v. *The Postal Tel. Co.*, for *delay in the delivery of a telegram.*" The Court held the stipulation was valid in respect to delays, saying:

> "We are of the opinion that the regulation set out in this question is a reasonable one. The provision seems primarily intended to limit the liability of the company for mistakes in transmission rather than for delay, *though the rule includes a limitation of the company's liability for delay in transmission.*"

In California the leading cases regarding the validity of the above stipulation are in

> *Hart* v. *Western Union,* 66 Cal., 579;
> *Coït* v. *Western Union,* 130 Cal., 657;
> *Union Con. Co.* v. *W. U.,* 163 Cal., 298.

The first two cases expressly held that the stipulation is valid, whether applying to errors or delays, and that "as to its validity and binding force in this State at least, the law may be considered settled" (130 Cal., 661).

But both of the above cases arose out of errors in transmission and therefore the entire question was reconsidered by the Supreme Court in the Union Construction Co. case where the authorities are again reviewed at great length.

The Court says, page 315:

> "Under these circumstances we may consider whether or not the contract in question should be construed to apply to *delays* in the delivery of a message which has been correctly transmitted,"

and reached the following conclusion concerning the question of delays, page 316:

> "For these reasons it (the stipulation) should be interpreted to provide only for *delays* and mistakes occurring in the forwarding of a message *from the company's desk where it is received from the sender*

to the company's office where it is written out and made ready for delivery to the addressee."

In California the above statement may be taken to be the rule now adopted by our Supreme Court as to delays at an intermediate point. If the delay of the message in suit occurred between Reno and Wabuska, it was a *delay at an intermediate office* and comes within the rule thus laid down. If, on the other hand, the message reached Wabuska, as stated by the witness Collins, the further delay was attributable to the connecting line and the result is the same.

THE STIPULATIONS UNDER CONSIDERATION HERE HAVE BEEN HELD REASONABLE AND VALID BY THE INTERSTATE COMMERCE COMMISSION, WHICH NOW HAS JURISDICTION OVER INTERSTATE TELEGRAPH COMPANIES.

Since the message in suit was transmitted, Congress by amendment to the Interstate Commerce Act, June 18, 1910 (36 Stat. L., 544, Chap. 309), assumed full control of the interstate business of telegraph companies. Said amendment provides that the Act shall apply to such telegraph companies and all charges shall be just and reasonable, and prohibits unlawful discrimination or preference, and provides further, Section 1, as follows:

"that messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classi-

fied into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages" (36 Stat. L., 544, 545).

Said Act further, by Section 315, invested the Interstate Commerce Commission with jurisdiction to determine the *reasonableness of rates, regulations and practices of such companies.* The reasonableness and validity of the stipulations in question here came before the Interstate Commerce Commission in the case of

Cultra v. *Western Union Telegraph Co.*

decided May 17, 1917, and reported in the advance sheets of the Interstate Commerce Commission decisions, 44 I. C. C., p. 679. While, as above stated, the message in question was sent before the amendment to the Act of Congress, yet the stipulations in question in both cases are the same, and if they are reasonable and valid limitations now under the present Act of Congress which expressly approved the classification of messages, they were reasonable and valid at the time the message in suit was sent. We invite the Court's attention to the entire body of the opinion in this case. Portions which are pertinent to the decision here are as follows:

"Almost from the beginning of telegraphy in this country the basic rate has been that charged for the transmission of an unrepeated message, the

rates for repeated and special value messages being built upon it. The unrepeated rate or charge has always been made upon the condition, stated in the contract between the sender and the company, that no liability should attach to the company for errors in transmission or delays in delivery beyond the sum received for sending the message. The higher rate for repeated messages, concurrently maintained for many years with the unrepeated rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make good any damages incurred, through error or delay in the transmission or delivery of the message, to the extent of fifty times the rate charged, with a maximum of $50. For a long time also the defendant has maintained still higher charges under which, upon the payment of one-tenth of 1 per cent. of the amount of the assurance desired, the defendant, within the value so placed upon the message, assumes liability to the full extent of the loss sustained. The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves.

"The complainants contend that rates, and rules of this kind affecting the rates, that limit the liability of a telegraph company for error in transmission are unreasonable, because it is the duty of

such a carrier, under the charges paid to it, to transmit all messages correctly. This theory assumes that the rate for an unrepeated message must necessarily embrace the obligation to transmit it correctly and to respond in damages for the failure to do so. On that point in *Primrose* v. *Western Union Telegraph Co.,* 154 U. S., 1, 25, it is said:

" 'The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery, or in the non-delivery of a message.' "

And again:

"As has been said, the complainants cite many cases in which restrictions upon the liability of this defendant under its several classes of rates have been considered and the restrictions are variously referred to as unjust, unconscionable, without consideration, utterly void, or as being contrary to sound public policy. We are asked by the complainants to announce the latter principle in this case. On the other hand, the defendant cites an equal number of cases in which courts of great authority have upheld the restrictive rates. We shall not undertake to review any of these cases

here. It will suffice to say that, apart from the federal legislation now under consideration, the complainant's action, if brought in some State courts would apparently meet with success, while if laid in the courts of other States would result in failure. This lack of uniformity among the courts, when dealing with the defendant's rates and the rules and regulations affecting its rates for the transmission of interstate messages, to some extent may explain the legislation by which the Congress has put all telephone and telegraph companies engaged in the interstate transmission of messages under our jurisdiction. *But whatever may have occasioned the amendatory legislation, one of its necessary consequences, under the language used, has been to put an end to this diversity in results; so that, as will be seen further along in this report, the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts."*

And again:

"Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed. Abundant authority

for this view is found in numerous decisions by the State and federal courts. In *Boyce* v. *Western Union Telegraph Co.,* 89 S. E. (Va.), 106, 108, it is said:

"'. . . Congress, by the act of June 18, 1910, seems to recognize the necessity and validity of such stipulations and to authorize the making of such contracts with respect to repeated and unrepeated messages.

"'. . . So that telegraph companies have here the direct authority and sanction of Congress to classify their messages into repeated and unrepeated and to charge different rates for each; in other words, to enter into the very contract which was made in this case.'

"See also, to the same effect, *Western Union Telegraph Co.* v. *Dant,* 42 App. D. C., 398; *Western Union Telegraph Co.* v. *Bank of Spencer,* 156 Pac. (Okla.), 1175, 1179; and *Haskell Implement & S. Co.* v. *Postal Telegraph-Cable Co.,* 96 Atl. (Me.), 219, 223."

THE SUBJECT OF THE MEASURE OF DAMAGES.

If there is any liability in this case, the measure of damage would seem to be the difference between the amount of the payment to Pitt and Campbell and the value of the stock at that time. There is no allegation in the complaint that the stock was of no value; there is no allegation that it was not worth the price agreed upon. If the stock had been selling on the market for $75,000, the price named in the contract, the plaintiffs would not have been damaged

by the payment of the draft. We respectfully urge therefore that the Court erred in not sustaining the demurrer upon this ground.

It is certain, however, that the amount of damage sustained by the plaintiffs, if any, is a matter which had to be determined by the evidence in the case and after a consideration of the above facts therefore, the amount could not be said to draw interest.

SUMMARIZING.

We respectfully contend:

1st. The contract between Lange and Hastings and Pitt and Campbell was not an option but was an absolute agreement to buy the stock, and that the forfeiture clause at the end of the agreement was intended to provide an additional remedy for the benefit of the vendors.

2nd. The provision in the contract that "thereupon" the rights of the parties should cease and determine, relates not to the default of purchasers, but to the *return of the stock which the evidence does not show was ever returned.*

3rd. That if the contract could be construed to be an option, it was a continuing option or offer to sell, which was accepted when the plaintiffs mailed the bank draft prior to the filing of the telegram, with the instructions to apply it on the agreement.

4th. The message was sent subject to the terms and conditions of a written contract agreed to by the parties and which is valid.

5th. The alleged *oral contract of insurance was in conflict with the written agreement* under which the message was sent.

6th. The judgment should not be for more than the amount received for sending the message, nor in any case beyond fifty times the sum received for sending the same.

Respectfully submitted.

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